



Committee on Rulemaking  
Minutes  
March 21, 2012

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Members Attending

Randy May

*Public Member—Free State  
Foundation*

Nina Mendelson

*Public Member—University of  
Michigan*

Richard Pierce

*Public Member—George  
Washington University*

Esa Sferra-Bonistalli

*Gov't Member—United States  
Coast Guard*

Carol Ann Siciliano

*Gov't Member—Environmental  
Protection Agency*

Lon Smith

*Gov't Member—Internal  
Revenue Service*

Robert Rivkin (Chair)

*Gov't Member—Department  
of Transportation*

ACUS Staff Attending

Emily Bremer

*Staff Counsel*

Jeffrey S. Lubbers

*Research Director*

Funmi Olorunnipa

*Project Advisor*

Paul R. Verkuil

*Chairman*

Invited Guests Attending

Jack Beermann

*Consultant—Boston*

*University Law School*

The meeting commenced at 9:30am at the Administrative Conference of the United States.

**Meeting Opening**

Committee Chair Robert Rivkin, and the committee began its work by approving on a voice vote the minutes of the committee's February 23rd meeting. Mr. Rivkin then offered Consultant Jack Beermann an opportunity to open the substantive discussion with some initial comments. Mr. Beermann suggested a few minor edits to help clarify and strengthen the recommendation. The committee approved these changes.



## **Recommendations to Incumbent Presidential Administrations**

The committee agreed to split recommendation one into two separate recommendations. Government Member Carol Ann Siciliano suggestion it be split into: (1) a recommendation targeting agency management of the rulemaking process; and (2) a recommendation targeting the “issuance” of midnight rules. This change was approved by the committee. The committee approved the new language of recommendation one to be the same as the original first paragraph of recommendation one, only with the word “each” deleted from the first sentence. After some deliberation, the committee also determined the following new language of recommendation two: “The introduction of new significant regulatory initiatives late in an incumbent administrations term should be avoided unless there is a compelling reason or a reasonable belief that that the incoming administration would not object.” Mr. Rivkin then moved that old the original subsection (1) of recommendation one be removed; the motion passed on a voice vote.

The committee then agreed to refer to “midnight rules” as “rules made during the midnight period.” The further agreed to define “midnight period,” in both the preamble and in a footnote to the recommendations, as the 90 days at the end of a presidential term. The committee also approved a motion permitting Conference staff to make conforming changes throughout the draft.

Ms. Siciliano suggested that the second sentence of recommendations three, now recommendation four, be removed because it was redundant. The committee agreed

There were no objections to recommendation four, now recommendation five. There was some discussion of recommendation five, now six, and the committee ultimately agreed to adopt the language “should share appropriate information.” Mr. Rivkin then turned the committee’s attention to the next section of recommendations.

## **Recommendations to Incoming Presidential Administrations**

Mr. Rivkin asked for any objections to this section of recommendations. Hearing none, he moved the discussion to the section of recommendations, which included those directed to Congress.

## **Recommendations to Congress**

There was extensive discussion of recommendation eight, now nine. Ms. Siciliano noted that agencies can already delay the effective dates of rules, but are required to use notice and comment to do so. In light of this, she suggested that the focus of the recommendation should be on lifting the notice and comment requirement for delaying the effective dates of midnight rules, at least in certain circumstances. Following discussion of the issue, the committee reached consensus on two points. First, agencies should use notice and comment wherever possible. Second, to address those situations in which there is not sufficient time before an effective date



to use notice and comment, Congress should authorize agencies to delay the effective without notice and comment. This privilege would be accorded only within a specified grace period following the start of a new administration's term in office. After further deliberation the committee agreed to adopt the following language:

In order to facilitate the incoming administration's authority to review midnight rules, the Congress should consider authorizing agencies to suspend for up to 60 days, without notice and comment, the effective dates of published rules that have not yet gone into effect, but would go into effect in first 30 days of a new administration.

Mr. Rivkin moved to delete the remaining language of recommendation eight, now nine. The motion passed on a voice vote.

### **Recommendations to Incoming Presidential Administrations**

Mr. Rivkin had to leave the meeting early, so Richard Pierce took over as Acting Chair. The committee decided to return its attention to the recommendations to incoming administrations. Ms. Siciliano stated that she thought the recommendations as they stood opened agencies up to additional judicial review. Courts, she explained, would likely interpret an agency action reaffirming a delayed rule as a new final agency action subject to judicial review. Mr. Pierce agreed. Ms. Siciliano also suggested that one solution would be to recommend that courts view the reconsideration of midnight rules as "good cause" to forgo notice and comment. Concerned that this suggestion was not supported by the research, the committee did not adopt it. Following further deliberation over whether to remove the recommendations to incoming presidential administrations, Mr. Beermann suggested that the recommendations could be salvaged as a "best practices" section. There was not time, however, for the committee to come to a consensus on this final aspect of the draft recommendation.

### **Meeting Closing**

Chairman Paul Verkuil noted that the preamble to the recommendation would have to be amended to conform to the committee's discussion and that the recommendations could be circulated to all committee members for their approval without an additional meeting. The meeting adjourned at 12:37 pm.